

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 57 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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HARIBHAI J BHARVAD

Versus

STATE OF GUJARAT

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Appearance:

MR RD DAVE for Petitioner

MR VB GHARANIA, AGP for Respondent No.1

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 30/08/1999

ORAL JUDGEMENT

1. Heard learned counsel for the parties.

2. The petitioner by this petition challenges the order of the respondents dated 8.7.1988 Annexure-E under which his services were terminated on the ground that he failed to pass departmental examination as provided under the Gujarat Non-Secretariat Clerks and Clerk-cum-Typist

(Training and Examination) Rules, 1970 (hereinafter referred as the Rules) within permissible attempts i.e. 3 regular plus 2 additional.

3. I find from the Rules that candidates who were appointed as Junior Clerks has to pass Departmental examination as provided thereunder within 3 attempts. In the special circumstances 2 additional attempts could have been given and those have also been given, but the petitioner fail to pass examination, hence his services were brought to an end under the impugned order.

4. Learned counsel for the petitioner submitted that termination of the services of the petitioner at that point of time may not be illegal, but the petitioner has absolute right to go on appearing in the examination and when he passed the examination then respondent has to take him back in the services with all the service benefits.

5. It has next been contended that the petitioner has been given six attempts and he passed this examination in the last attempt, but despite the same he was not taken back in the service by the respondent.

6. Lastly, it is contended that the respondents are making hostile discrimination in such matter, though the case of the petitioner with other employees who have been allowed 6 and 7 attempts are identical but their services were not terminated.

7. Mr.Gharania, learned counsel for the respondents contended that this writ petition is wholly misconceived. Earlier this court has given the directions to the respondents to consider the case of the petitioner and it has considered the same, but his claim was not found meritorious and the same has been declined. Replying to the contention raised of giving 6th chance to the petitioner Mr.Gharania contended that by mistake this chance has been given otherwise he was not entitled for it. Illustrating how it is the case of mistake, respondents have given out the detail facts in paragraph 14 of the reply to the Special Civil Application. Replying to the plea of discrimination learned counsel for the respondents contended that the cases of those two persons are clearly distinguishable. The case of Shri Hihora is a case of promotion. So far as Kumari Joshi is concerned learned counsel for the respondent contended that she was given sixth chance as a special case.

8. I have given my thoughtful consideration to the

submissions made by the learned counsel for the parties.

9. Gujarat Non-secretariate Clerk and Clerk-cum-Typist Training Examination Rules, 1970, have not been produced on the record of this Special Civil Application by either of the parties. In reply to the Special Civil Application reference to some of the rules of the Rules have been made. Rule 6 of the Rules provides that on conclusion of training candidates shall be required to appear at the post training examination and to pass it in not more than 3 chances, provided that chance is already availed of shall be counted as have been availed of under this rules. It has further been provided that candidates belonging to Scheduled Caste and Scheduled Tribe may be given one more chance. Then comes another proviso which is relevant for this case, which provides that, if, in case of any candidate who could not pass the examination in three chances and State Government is satisfied that he could not pass the examination at which he has last chance for the reasons beyond his control or that he fail to pass that examination by a very narrow margin of the marks, the State Government may after recording reasons in writing give him not more than two additional chances to appear in the examination on payment of prescribed examination fees.

10. Rule 8 of the Rules provides that if a candidate fail to receive prescribed training and/or fail to pass post training examination as required under these rules, he shall not be eligible for appointment as regular clerk or Clerk-cum-Typist as the case may be, in the office mentioned in rule 3.

11. Sub rule 2 of rule 8 of the Rules speaks that if a candidate who is appointed as clerk or clerk-cum-typist as stop gap arrangement subject to undergoing training and/or fails to pass post training examination as required under the Rule, his services shall be terminated. Admittedly, the petitioner could not pass this examination in three attempts and on his request maximum indulgence which could have been permissible to the Competent Authority under the rules has been given to him. He was giving two additional chances for this examination, but he could not pass the examination under the Rules even after availing these two additional chances.

12. Sub rule 2 of rule 8 of the Rules empowers the appointing authority to terminate the services of such employee and services of the petitioner were terminated

accordingly under the impugned order. The scheme of the Rules is very clear and this examination has to be passed by a candidate belonging to general category in 3 + 2 chances. It is not the scheme of the Rules nor I find any provision therein which gives liberty to the employee to go on appearing in the examinations so long as he has not passed and more so, even after the termination of his services and when he passed this examination, there is legal obligation on the respondents to take him back in the services.

13. Learned counsel for the petitioner does not dispute right of the appointing authority to terminate the services of the petitioner on his failure in fifth attempt in the examination. The contention of the learned counsel for the petitioner is that as in sixth attempt the petitioner has passed this examination, he is to be taken back in the service with all the benefits. This contention is devoid of any substance and merits.

14. Sixth attempt irrespective of the fact whether it is granted to the petitioner by mistake or not, is not available to the petitioner under the Rules. The Rules are statutory rules as framed under Article 309 of the Constitution. These rules provide maximum five attempts to the employee for passing of the departmental examination and even appointing authority or the State Government has no power to grant sixth attempt to the petitioner. It is no more res integra that even it is not permissible for this Court to give directions to the respondents to provide sixth attempt to the petitioner when under the rules maximum five attempts could have been given to him. If, such directions are given by this court, it will amount to asking the respondents to act contrary to the rules framed under Article 309 of the Constitution. That what is not permissible to this court under Article 226 of the Constitution. This court can only give directions to the respondents to act in accordance with the statutory rules and not to act contrary to the statutory rules or in violation thereof.

15. Much emphasis has been led by the learned counsel for the petitioner on the fact that the respondents have permitted sixth chance to the petitioner and in which attempt as he had passed the examination, they should have reinstated him back in service with full back wages.

16. In reply to the Special Civil Application the respondents have come up with the case that the petitioner by mistake and error was permitted to appear in the sixth chance. From the reply of the Special Civil

Application I find that it is the case where the petitioner has managed some how to appear in the examination sixth time. I Card is must for the candidate to have and possess and without which he could not have been permitted to appear in the examination. In this case it was not with the petitioner, but, still he was permitted to appear in the examination and which goes to show that the petitioner has managed to appear in this examination.

17. The Deputy Collector, Regional Training Centre, Ahmedabad has written a letter dated 24.7.1991 to the Collector, Surendranagar. This officer noticed that the petitioner was informed to appear in the examination to be held on 26.8.1991 under the impression as if he was declared unsuccessful in the second chance. What the respondents submitted as if either inadvertently or by mistake the concerned officer has lost the sight of the word additional second chance. It is a nice way of presenting the things and more so to protect the officer, otherwise prima facie I am satisfied that it is a document which has been prepared for the benefit of the petitioner for the reasons best known to the officer concerned. The Collector, Surendranagar should not have taken this matter lightly or casually. If, we go by these facts coupled with the facts that without I - Card the petitioner was permitted to appear in the examination, it is a clear case where possibilities of somebody sitting in the office of the Deputy Collector, Regional Training Centre, Ahmedabad, is favouring the petitioner also cannot be excluded. The Collector, Surendranagar intimated the matter to the General Administration Department. The date of the letter seems to be incorrect, if we go by further facts as stated in the affidavit. However, fact remains that the petitioner has managed to appear in the examination without prior permission of the General Administration Department and without I Card. It is a matter of inquiry what for the reasons best known to the officer concerned, why action has not been taken against the officer/person concerned.

18. Be that as it may. This examination of the petitioner was cancelled and rightly so as sixth attempt was not permissible to the petitioner under the Rules and the respondents could not have permitted or granted any attempt to him contrary to the Rules. After failure of the petitioner in fifth attempt in this examination only result would have been of the termination of his services, what which has been done in this case.

19. Under the Rules, neither the State Government nor

its officers or even this court could have granted sixth attempt to the petitioner. The petitioner has no right to sit sixth time in the examination under the Rules and even if it is permitted to appear sixth time in examination, he appeared in the examination and declared successful also therein is of no help and substance. This examination of the petitioner is illegal as being contrary to the Rules and rightly it was taken to be so and cancelled accordingly by the respondents to which no exception can be made.

20. Now, I may advert to the contention made on the ground of discrimination. Learned counsel for the petitioner has cited the cases of the persons which in his submissions are comparable cases. First is the case of Shri Hihora and second is of Kumari Joshi.

21. From the reply of the respondents, I find that the case of Shri Hihora Mansukhbhai Budhabhai is clearly distinguishable. He was working as Chowkidar (Class-IV). On his passing of SSC Examination, he acquired eligibility for promotion to the post of Clerk. He has to pass the examination under the Gujarat State Class-IV Employees Training and Examination Rules prescribed by the notification dated 8.4.1968. As per the aforesaid provisions, he could have appeared in the examination on payment of fees at any time. Even after availing three chances, no limitation of chances is attracted in his case. The case of promotees and direct recruitees cannot be treated at par. These two employees constitute different classes. Kumari Joshi had not passed the post training examination within three chances under the Gujarat Non-Secretariat Clerks and Clerk-cum-Typist (Training and Examination) Rules, 1970. It is admitted by the respondent that she could not pass the examination aforesaid within prescribed chances and thereupon two additional chances were given to her under the Rules. She even fail to pass the aforesaid examination in two additional chances, and her services were brought to an end by the respondent. She challenged that action of the respondent in this court by filing the Special Civil Application No.1435/84 which came to be decided on 14.10.1991. This court rejected the petition, that is to say, her prayer for grant to her one more chance, that is, third additional chance to appear at the examination was not accepted. She preferred Letters Patent Appeal No.3168/91 against the judgment and order of the learned Single Judge which also came to be rejected by the Division Bench. This fact is undisputed by the petitioner that this court had held that, maximum two additional chances to pass the examination under the

Rules aforesaid are permissible to the Clerk. It is different matter that on her request made to the Honourable Chief Minister of the State, General Administration Department under its order dated 8.1.1993 granted her one more additional chance i.e. third chance as a special case. If, we go by the decisions of this court, both of the learned Single Judge and the Division Bench and the scheme of the Rules aforesaid, third additional chance could not have been granted to a Clerk and it could not have been granted to Kumari Joshi also. The respondent State of Gujarat and its officers and even the Honourable Chief Minister of the State has no right to act contrary to the statutory Rules. The Rules, 1970 permitted the competent authority only to the extent two additional chances to a candidate to appear in the examination, if the case is made out for grant thereof. Third additional chance under the caption "Special Case" could not have been granted to Kumari Joshi or to anybody else. The order of the General Administration Department dated 8.1.1993 under which Kumari Joshi was given as special case as one more additional chance to appear in the examination is not subject matter of the challenge before this court. But on the facts given by the respondent in the reply, I am prima facie satisfied that, indulgence shown or the benefit extended to Kumari Joshi was contrary to the statutory Rules. The Honourable Chief Minister or Honourable Minister or the Secretary of the department concerned has no right whatsoever to act contrary to the Rules. That is different matter that they are doing so, and in fact, it appears to have been done in the case of Kumari Joshi. The plea of discrimination is raised by the learned counsel for the petitioner in this case and if we examine this plea with reference to the case of Kumari Joshi, what the petitioner contends is not without substance or merit. The question does arise whether the plea of discrimination can be permitted to be raised and order of the otherside challenged in this petition can be set aside on this plea which based on illegal and unwarranted order of the authority. I cannot do better than to make here reference to the decision of the Honourable Supreme Court in the case of Chandigarh Administration Vs. Jagjitsingh, AIR 1995 SC 705. Their Lordships of the Supreme Court held;

"We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with

such pleas at a little length. Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law - indeed, wherever it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law - but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and a similar relief can be given to the petitioner if it is found that the petitioner's case is similar to the other person's case. But then why examine another person's case in his absence rather than examining the case of the petitioner who is present before the Court and seeking the relief. It is not more appropriate and convenient to examine the entitlement of the petitioner before



the court to the relief asked for in the facts and circumstances of his case than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the Court nor is his case. In our considered opinion, such a course barring exceptional situations - would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises).

22. Here, in this case the matter of grant of third additional chance as special case to Kumari Joshi is not for consideration before this court. She is also not party to this petition and the petitioner has not challenged that order of the General Administration Department extending the benefit which appears prima facie to be contrary to the Rules to that lady employee. But, it is certain and explicit, I am satisfied that under the Rules, third additional chance cannot be granted to the Clerk for passing of the departmental examination. The plea of discrimination based on the order of the respondent dated 8.1.1993 in which third additional chance has been granted to Kumari Joshi to appear in the examination as a special case cannot be made a ground to give the third additional chance to the petitioner also.

23. Yet the matter needs to be considered from another aspect. If, the plea of the petitioner is accepted relying upon the plea of discrimination and the petitioner is given third additional chance to appear in the examination, this will result in asking to the respondent to act contrary to the statutory Rules, and this court sitting under Article 226 of the Constitution

of India cannot issue a writ of mandamus or any other writ, order or direction to the respondent to pass the order extending the benefit to the petitioner de hors the statutory Rules. Otherwise also, this court exercising its power under Article 226 of the Constitution of India, will not perpetuate illegality. The relief of the nature as prayed for if granted to the petitioner in the facts of this case, it will certainly amount to perpetuating illegality by this court sitting under Article 226 of the Constitution of India which this court will not do. Fruitful here the reference may have to the following decisions of the Apex Court and different High Courts.

AIR 1966 SC 828, Venkateshwar Rao Vs. Government  
of Andhra Pradesh.

AIR 1994 Raj 53, Himat Jain Vs. State of  
Rajasthan.

AIR 1968 Kerala 76, AM Mani Vs. State Electricity  
Board.

AIR 1977 Patna 166, Devendra Prasad Gupta Vs. State  
of Bihar and others.

AIR 1990 Patna 165, Chintamani Sharan Nath Vs. State  
of Bihar.

AIR 1980 Raj.1, Jagan Singh Vs. State Transport  
Appellate Tribunal, Rajasthan.

24. As a result of the aforesaid discussion, no relief of the nature as prayed in this petition by the petitioner can be granted to him.

25. In the result, this Special Civil Application fails and the same is dismissed. Rule discharged. Interim relief, if any, granted stands vacated. No order as to costs.

(S.K.Keshote,J.)  
(pathan)